LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 9 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1411

JEANNE S. WEED and SALLY ANNE DELUCCIA,
Petitioners,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

WALTER WARREN,
212 North Fourth Street,
Post Office Box 83,
Leesburg, Florida,
Attorney for Petitioners.

GURNEY, McDONALD & HANDLEY,
203 North Main Street,
Orlando, Florida,
Attorney for Respondent.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3040

INDEX

Alphabetical List of Authorities Cited	I
Recitation re Filing Petition for Writ of Certiorari	1
Official Report of the Order by the Court Below	2
Statement of the Grounds of Jurisdiction	2
Question	2-3
Statement of the Case	3-7
Argument	7-15
Importance of Granting This Writ of Certiorari	15-16

Alphabetical List of Authorities Cited

FEDERAL STATUTES

U.S.C.A.—

Section 346, Judicial Code	2
Section 1254 (1) of Revised Title 28	2
Section 1332 (a) (1), Title 28	7

STATE STATUTES

Florida Statutes—

Chapter 222.13	3

CASES

Begley v. *Miller*, 137 Ill. App. 278, as quoted in 52 A.L.R. 384	12
Connecticut Mutual Life Ins. Co. v. *Schaefer*, (1877) 94 U.S. 457, 24 L. Ed. 451; see also Annotation, Sec 3, Gen'l Rule, 175 A.L.R. 1224	12
Ficke v. *Prudential*, 202 S.W.2d 429, 175 A.L.R. 1215	11
Gulbenkian v. *Gulbenkian*, L.R. (1927), Prob. (Eng.) 237	13

Humphrey v. *Mutual Life Ins. Co.*, (1915) 86 Wash. 672, 151 Pac. 100 12

Jacoby v. *Jacoby*, 69 S.D. 432, 11 N.W.2d 135 12

McKee v. *Phoenix Ins. Co.*, (1859) 28 Mo. 383, 75 Am. Dec. 129 11

New England Mut. L. Co. v. *Spence*, C.C.A., 104 F.2d 665, 125 A.L.R. 128 13

Phoenix Mut. L. Ins. Co. v. *Birkelund*, 24 Cal. 2d 352, 175 P.2d 5 12

Sea v. *Conrad*, 155 Ky. 51, 47 L.R.A. (N.S.) 1074, 155 S.W. 622 13

IN THE

SUPREME COURT OF THE UNITED STATES

No. .

JEANNE S. WEED and SALLY ANNE DeLUCCIA,
Petitioners,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

To: The Honorable, the Supreme Court of the United States:

The petition of Jeanne S. Weed and Sally Anne DeLuccia, respectfully prays for a writ of certiorari to the United States Court of Appeal, for the Fifth Circuit, to review the decision of said Court rendered the 27th day of March, 1961.

OFFICIAL REPORT OF THE OPINION AND JUDGMENT BY THE COURT BELOW.

1. (a) The opinion and judgment which petitioners seek to have reviewed, is that in the case of Jeanne S. Weed and Sally Anne DeLuccia, appellants, versus Equitable Life Assurance Society of the United States, appellee, F.2d .

STATEMENT OF THE GROUNDS OF JURISDICTION.

(b) This Court has jurisdiction to review said opinion and judgment under Section 346 of the Judicial Code, Sec. 1254 (1) of Revised Title 28, U.S.C.A.

(i) The date of the opinion and judgment of the Circuit Court of Appeal, Fifth Circuit, sought to be reviewed, is March 27, 1961, and was entered the same day.

(ii) This Court has jurisdiction to review said opinion and judgment under Section 346 of the Judicial Code, Section 1254 (1) of Revised Title 28, U.S.C.A.

(c) The question which is presented for the Supreme Court's consideration is:

> WHERE A MAN MAKES HIS WIFE BENEFICIARY OF INSURANCE AND THEREAFTER BECOMES MENTALLY DISABLED FOR THE REST OF HIS LIFE, AND DURING SUCH PERIOD OF DISABILITY HIS WIFE FRAUDULENTLY DIVESTS HIM OF ALL OF HIS PROPERTY, BOTH REAL AND PERSONAL, AND THERE IS EXTENSIVE LITIGATION BY THE GUARDIAN OF SUCH INCOMPETENT HUSBAND, IN WHICH HIS PROPERTY IS SUCCESSFULLY RETRIEVED FROM HIS WIFE AND SHE THEN DIVORCES HIM UPON

THE GROUND OF INSANITY AND HE THEN DIES AND THE PROBATE OF HIS WILL LEAVING EVERYTHING TO HER IS REVOKED AT THE TRIAL BEFORE THE PROBATE COURT FOR THE REASON THAT THE DECEDENT TESTATOR (INSURED) DID NOT POSSESS MENTAL CAPACITY TO MAKE A WILL, AND THE SAID PURPORTED WILL HAVING BEEN EXECUTED A FEW DAYS FROM THE PURPORTED EXECUTION OF DESIGNATION OF THE BENEFICIARY; AND SUCH INSURED LEAVES NATURAL CHILDREN, ARE THE NATURAL CHILDREN NOT ENTITLED TO THE PROCEEDS OF SAID POLICIES INSTEAD OF THE DIVORCED WIFE?

(d) The statute involved is Chapter 222.13 Florida Statutes 1941, which reads as follows, the pertinent part is emphasized:

> "Whenever any person shall die in this state leaving insurance on his life, *the said insurance shall inure exclusively to the benefit of the surviving child or children and husband and wife of such person in equal portions*, or to any person for whose use and benefit such insurance is declared in the policy."

STATEMENT OF THE CASE.

(e) The case has arisen on the following facts:

In December of 1947 and February of 1948, George E. Stevens purchased three certain insurance policies from the defendant and had the beneficiary thereof designated as Louella H. Stevens (although she is better known as Jane Hooks Stevens and is so referred to in many instances).

That at the time of the issuance of said policies, George E. Stevens was a practicing medical doctor in the City of

Leesburg, Florida. Shortly thereafter the mental and physical health of the said Stevens began to fail and his ability to hold forth in the practice of medicine became impaired with result that he was compelled to abandon his practice and closed his personally owned clinic and hospital in Leesburg, Florida. Thereafter, on November 22, 1952, a purported application for change of beneficiary was made to the defendant herein so that the three policies of insurance hereinabove described, would be re-issued, vesting all rights in the insured (George E. Stevens) and his wife, Louella H. Stevens (Jane Hooks Stevens) jointly. Jane Hooks Stevens testified under oath in a subsequent lawsuit, The First National Bank of Leesburg, as guardian, versus Jane Hooks Stevens, that she induced him to sign the applications for change (although there is evidence that he never signed them at all, and that the signatures thereon are forgeries, see pages 12-13 of the Transcript of Record hereinafter referred to as Tr.).

Thereafter the policies were re-issued and the beneficiary clause in each of them read:

> "The insured's wife, Louella H. Stevens, if living at the death of the insured, if not then living, in equal shares to the insured's daughters, Colvin Georgeanne Stevens and Diana Jane Stevens, if then living, or to the survivor of them."

It is alleged that George E. Stevens did not sign the application for change of beneficiary, and in any event, he was mentally incompetent in October and November, 1952, and legally incapable of executing any legal document that would at that time or at any time prior to his death, that would have any legal force or effect.

Subsequently, Louella H. Stevens, also known as Jane Hooks Stevens, obtained a final decree of divorce from the

insured, in the State of Nevada, on the 9th day of July, 1954, some ten months prior to the death of George E. Stevens, on May 1, 1955. In the meantime George H. Stevens had made no further attempt to change the designation of beneficiary on his policies.

The record shows that from September 26, 1952, on which date George E. Stevens was adjudicated mentally incompetent by the County Judge of Orange County, Florida, pursuant to a petition sworn to by Jane Hooks Stevens, on until the end of his life, Jane Hooks Stevens, the purported beneficiary of these policies of insurance embarked upon and pursued a course of treatment directed towards this unfortunate, sick man, that is almost without parallel for diabolical cunning and wickedness. Among other things she did was to obtain a power of attorney purported to be signed by him on the same day that she had him adjudged mentally incompetent, and on the same day executed a deed, as attorney in fact under said purported power of attorney, conveying the hospital, clinic and home of this unfortunate man to a Colvin Wilhite of Atlanta, Georgia, an uncle of the said Jane Hooks Stevens (Tr. 15).

Thereafter, The First National Bank of Leesburg was appointed guardian for Stevens and instituted an action in the State court to recover the property that she had fraudulently divested him of. This suit was successful and the net effect was to sustain the proposition that the said George E. Stevens was mentally incompetent, and by reason thereof, Jane Hooks Stevens had fraudulently divested him of the title to his property, which was restored by this action, either in kind or in negotiable equity, except that she was allowed to retain the home place in order to have a place to rear their two minor children (Tr. 18).

After the conclusion of this litigation, Jane Hooks Stevens went to the State of Nevada, and in due course instituted action for and obtained a final decree of divorce. The ground for divorce and the finding of the Court was the insanity of George Ernest Stevens (Tr. 18-19).

Thereafter, George E. Stevens departed this life in a nursing home in California, on May 1, 1955 (Tr. 19).

Jane Hooks Stevens then produced an alleged will signed by George E. Stevens on September 16, 1952, and offered the same for probate in the County Judge's Court of Lake County, Florida. The plaintiffs in this case, being the children of the decedent by his first marriage, filed a petition for revocation of said will on the ground that George E. Stevens did not possess testamentary capacity on September 16, 1952, being the date of the will. Extensive testimony was taken before Judge Hall, from three practicing licensed psychiatrists, each of whom had treated Dr. Stevens, to-wit: Dr. Samuel Hibbs of Tampa, Florida, Dr. Roger E. Phillips, of Orlando, Florida, and Dr. Mark Griffin of Asheville, North Carolina. Each of these doctors testified unequivocably that George E. Stevens did not possess testamentary capacity on September 16, 1952. No testimony to the contrary was offered by Jane Hooks Stevens. At the conclusion of the hearing, County Judge Hall announced his ruling that from the evidence he was compelled to find that George E. Stevens did not possess testamentary capacity on September 16, 1952, and subsequently a complete order was entered by the court, finding among other things, "that the will was invalid because the decedent did not possess testamentary capacity at the time of the attempted execution of said will". (Tr. 19-20). This, therefore, establishes the fact that George E. Stevens did not have the mental capacity to execute the request for a change of beneficiary on November 22,

1952, in the instant case, which was a matter of 67 days after he signed the will, which was held invalid by reason of lack of testamentary capacity (Tr. 20).

Thereafter, Jane Hooks Stevens applied to the defendant for payment of the policies involved herein, which were paid to her. The petitioners in this case contend that they are entitled to the proceeds of said policies and are suing the respondent therefor.

(g) The basis for removal from the state court to the Federal court in the first instance was diversity of citizenship, Title 28, U.S.C.A., Sec. 1332 (a) (1).

ARGUMENT.

(h) It is recognized that the amended complaint in this cause probably does not conform to the principles of good form in pleading; but counsel respectfully asks this Court to read the original complaint herein, contained on pages 1, 2 and 3 of the record, which we believed to be a good complaint and should have withstood an attack as to the form and substance thereof. Nevertheless the District Court granted the motion to dismiss the same, appearing on pages 5 and 6 of the Transcript of Record, and it was felt that inasmuch as the actions of the divorced wife of the decedent (who had been designated beneficiary of the policies prior to the divorce) had been so heinous and so contrary to what has been considered by all civilizations to be proper conduct for a wife and mother, that if documentary evidence of this conduct were attached to the amended complaint and set forth in more or less detail, the point that we are trying to make in this case would be driven home to the courts, *i.e.*, that where relations between divorced persons are such that the court cannot assume that the husband intended for the divorced

wife to have the proceeds of his insurance policies, then as a matter of law, the proceeds should descend and be distributed by operation of law rather than under the designation of beneficiary; and upon the further grounds that when the last designation of beneficiary was alleged to have been signed by George E. Stevens, that he was absolutely, mentally incompetent, and that such designation of beneficiary had no force or effect whatsoever.

Inasmuch as this case is somewhat involved and inasmuch as whichever way this court rules in the matter, it will be establishing a new precedent in the United States, it is respectfully suggested that the allegations of the original complaint and the allegations of the amended complaint, appearing on the first twenty-four pages of the Record, should be examined with greater than ordinary care.

The District and Circuit Court of Appeals erred in holding, in effect:

> "WHERE A MAN MAKES HIS WIFE BENEFICIARY OF INSURANCE WHILE MENTALLY DISABLED WHICH CONDITION PERSISTS FOR THE REST OF HIS LIFE, AND DURING SUCH PERIOD OF DISABILITY HIS WIFE FRAUDULENTLY DIVESTS HIM OF ALL OF HIS PROPERTY, BOTH REAL AND PERSONAL, AND THERE IS EXTENSIVE LITIGATION BY THE GUARDIAN OF SUCH INCOMPETENT HUSBAND, IN WHICH HIS PROPERTY IS SUCCESSFULLY RETRIEVED FROM HIS WIFE AND SHE THEN DIVORCES HIM UPON THE GROUND OF INSANITY AND HE THEN DIES AND THE PROBATE OF HIS WILL LEAVING EVERYTHING TO HER IS REVOKED AT THE TRIAL BEFORE THE PROBATE COURT FOR THE REASON THAT THE DECEDENT TESTATOR (INSURED) DID NOT POSSESS MENTAL CAPACITY TO MAKE A WILL, AND THE SAID PURPORTED WILL HAV-

ING BEEN EXECUTED A FEW DAYS FROM THE PURPORTED EXECUTION OF DESIGNATION OF THE BENEFICIARY; NEVERTHELESS, NOTWITHSTANDING THESE FACTS AND NOTWITHSTANDING THE MENTAL INCOMPETENCE OF THE INSURED TO DETERMINE THAT HE STILL WANTED HIS EX-WIFE TO HAVE THE PROCEEDS OF HIS LIFE INSURANCE—THAT THE EX-WIFE WAS ENTITLED TO THE PROCEEDS OF INSURANCE POLICIES TAKEN OUT YEARS BEFORE WHILE THEY WERE STILL MAN AND WIFE." Because to so hold the court must indulge in a legal fiction that cannot be used here—that the insured *will be presumed* to have still wanted his ex-wife, instead of his children, to have his insurance proceeds.

AN EX-WIFE IS NOT ENTITLED TO THE PROCEEDS OF AN INSURANCE POLICY UPON THE LIFE OF HER LATE EX-HUSBAND WHERE: A HUSBAND TAKES OUT INSURANCE IN THE WINTER OF 1948 AND 1949 AND MAKES HIS THEN WIFE BENEFICIARY THEREOF, AND IN THE FALL OF 1952 THEREAFTER HE IS ADJUDGED MENTALLY INCOMPETENT BY A PROPER COURT AND IT AFFIRMATIVELY APPEARS FROM THEN ON THAT HE IS INCOMPETENT THE REST OF HIS LIFE, THAT HIS WIFE OBTAINED A NEVADA DIVORCE FROM HIM ON THE GROUND OF INSANITY AND THAT THE NEVADA COURT HELD THAT HE WAS INSANE, AND THAT DURING THE INTERIM PERIOD, HIS WIFE BY DEVIOUS AND FRAUDULENT MEANS DIVESTED AN UNFORTUNATE, MENTALLY ILL INSURED OF ALL OF HIS PROPERTY OF EVERY KIND, WHICH WAS RESTORED TO HIM BY JUDICIAL ACTION IN THE STATE COURT BY JUDICIAL ACTION INSTITUTED BY HIS GUARDIAN, THAT AFTER HIS DEATH THE EX-WIFE PRODUCED A WILL, TOTALLY DISREGARDING HIS CHILDREN AND LEAVING EVERYTHING TO HIS WIFE, AND WHICH WILL WAS DATED IN 1952 AND WHICH WAS REVOKED

BY THE PROBATE COURT ON THE BASIS OF COMPETENT PSYCHIATRIC EVIDENCE OF PSYCHIATRISTS WHO HAD TREATED THE DECEASED THAT HE WAS MENTALLY INCAPABLE OF HAVING TESTAMENTARY CAPACITY IN 1952; *THE COURT CANNOT ASSUME THAT SUBSEQUENT TO THE DIVORCE IT WAS THE INTENTION OF THE INSURED FOR HIS EX-WIFE UNDER THESE CIRCUMSTANCES TO STILL RECEIVE HIS INSURANCE AND DEPRIVE THE CHILDREN THEREOF* FOR TWO REASONS, (1) THE FACTS ALLEGED SHOW THAT THERE WAS EXTREME BITTERNESS BETWEEN THE PARTIES DURING THIS TIME AMOUNTING TO MURDEROUS INTENT ON BOTH SIDES, AND (2) INSURED WAS MENTALLY INCAPABLE OF FORMING SUCH AN INTENTION.

In this case, the petitioners, who are the children of the deceased insured, seek to collect from the respondent insurance company upon policies of insurance upon the life of their deceased father, which were payable to "The Insured's wife, Louella H. Stevens, if living" etc. (R. 98-114). Louella H. Stevens divorced the insured prior to his death (R. 42). Also prior to his death and for several years prior thereto, the insured and his wife had been engaged in a continuous and constant litigation whereby he sought, successfully, through his guardian, to retrieve properties which his wife had fraudulently divested him of while he was in a continuous state of not being mentally capable or mentally responsible for his acts (R. 36). After his death, a will made in her favor was revoked by the Court after hearing on the ground that the Insured, who was also testator, was not mentally capable of making a will (R. 48). The date of the execution of the purported will was within a few days of his purported application for change of beneficiary, whereby the insurance was pay-

able to "The Insured's wife", etc., as aforesaid. (R. 46, R. 72).

In the matter of a divorced wife attempting to collect insurance proceeds on a policy issued upon the life of her deceased husband prior to their divorce, there are five situations. These come under the so-called "Contract Theory."

1. Where a wife insures the life of her husband, pays the premiums, and subsequently a decree of divorce is entered.

In this situation the Courts have uniformly held that the wife has an insurable interest in the life of her husband and when she takes out an insurance policy on him and pays the premiums, she not only has a present property right in the policy but she also has a right to collect the proceeds upon his death even though they are divorced at that time. This reasoning is based on the fact that she has paid the premiums on the policy and at its inception it was not a "wagering scheme" that would take it out of the insurable interest doctrine. The leading cases on this are: *McKee* v. *Phoenix Ins. Co.*, (1859) 28 Mo. 383, 75 Am. Dec. 129, and *Ficke* v. *Prudential*, 202 S.W.2d 429, 175 A.L.R. 1215. This factual situation does not exist in the instant cause.

2. Where a man takes out a policy of insurance on his life, making his wife the beneficiary and then assigns the policy to her and subsequently a divorce is entered prior to his death.

The Courts have held that where a husband assigned a contract of insurance to his wife, she thereby becomes the owner of the property rights therein, that entitled her to collect the proceeds at his death even though they are then

divorced, particularly if she has paid the premiums thereon. The leading cases on this are: *Humphrey* v. *Mutual Life Ins. Co.*, (1915) 86 Wash. 672, 151 Pac. 100; and *Jacoby* v. *Jacoby*, 69 S.D. 432, 11 N.W.2d 135.

The cases dealing with this arise in situations where the insurance policy was assigned to the wife as a part of the divorce property settlement. See also: *Phoenix Mut. L. Ins. Co.* v. *Birkelund*, 24 Cal. 2d 352, 175 P.2d 5. This factual situation does not exist in the instant case.

3. Where the divorced wife was receiving alimony payments from her husband before his death by reason of provisions of final decree of divorce.

The Courts have held that where a divorced wife was receiving alimony payments from her husband by reason of the provisions of the divorce decree, upon his death she was entitled to collect the proceeds of an insurance policy payable to her as his wife, issued prior to the divorce. They base this on the proposition that the right to alimony payments gave her an insurable interest in the life of her husband after the divorce. A leading case on this is *Begley* v. *Miller*, 137 Ill. App. 278, as quoted in 52 A.L.R. 384. This situation does not exist in the instant case.

4. Where a man buys a policy of insurance on his life and makes his wife the beneficiary of the same and she divorces him before he dies and no change has been made in the designation of the beneficiary.

In this situation, the majority rule is that the wife is entitled to the proceeds of the policy.

The first leading case on this situation is *Connecticut Mutual Life Insurance Company* v. *Schaefer*, decided in 1877, and reported in 94 U.S. 457, 24 L. Ed. 451. See also Annotation, Sec. 3, General Rule, 175 A.L.R. 1224.

In deciding this line of cases, the Courts were faced with the necessity of maintaining that the divorced wife still had an insurable interest in the life of her former husband. They met this by basing their decisions on the *assumption* that the former husband still wanted his ex-wife to have the proceeds of his insurance; otherwise, he would have had the beneficiary changed after the divorce.

There is a minority rule on this situation in the United States. *New England Mut. L. Co.* v. *Spence*, C.C.A., 104 F.2d 665, 125 A.L.R. 128. In the State of Texas, the common law is that a divorced wife is prohibited from collecting the proceeds of any policy of life insurance in which she is designated beneficiary prior to the divorce. In the State of Kentucky, the same rule applies, the Court holding uniformly that the divorced wife cannot claim the insurance proceeds on the theory that the husband was entitled to the rights under the insurance policy automatically upon divorce. *Sea* v. *Conrad*, 155 Ky. 51, 47 L.R.A. (N.S.) 1074, 155 S.W. 622. In Kentucky, a statute is involved. The law of England provides that the divorced wife cannot collect insurance proceeds. *Gulbenkian* v. *Gulbenkian*, L.R. (1927) Prob. (Eng.) 237. The law is to the same effect in Canada. *Hart* v. *Tudor*, (1892) Rep. Jud. Quebec, 2 C.S. 534.

5. Where a man makes his wife beneficiary of insurance and thereafter becomes mentally disabled for the rest of his life, and during such period of disability his wife fraudulently divests him of all of his property, both real and personal, and there is extensive litigation by the guardian of such incompetent husband, in which his property is successfully retrieved from his wife and she then divorces him upon the ground of insanity, and there is extreme bitterness between the husband and wife, amount-

ing to murderous intent, and he then dies and the probate of his will leaving everything to her is revoked at the trial before the probate court for the reason that the decedent testator (insured) did not possess mental capacity to make a will, and the said purported will having been executed a few days from the purported execution of designation of beneficiary.

In this situation there is not a case that we have been able to find in the English language presenting the law thereon. Therefore, the Court must manufacture some law regardless of which way it rules.

However, by analogy, we feel that there can be absolutely no escape from the fact that the children of the deceased insured are entitled to the proceeds of his life insurance for the following reasons:

A. This Court should not indulge in the legal fiction as in situation No. 4, that the insured intended for his ex-wife to have the insurance proceeds because he did not change the beneficiary after the divorce. In this case, the insured was mentally incapable of forming such an intention. Also it cannot be presumed that he wanted his ex-wife to have the insurance proceeds because of some residue of affection for her. In this case there was the greatest bitterness between the parties, amounting at times to murderous intent.

B. There is no legal obligation to the ex-wife because the divorce decree did not provide for alimony or any kind of property settlement.

C. That there was every moral obligation on the part of the deceased insured towards his children who are the petitioners herein, as well as the legal obligation to them because at the time of his death all of said children

share in the estate, and under the will none of them would have shared in it.

The situation is simply this: The divorced wife was not entitled to the insurance proceeds, *because the change of beneficiary was executed when the insured was not mentally competent.* Then she could not take under the original designation of beneficiary because she treated him so abominably, stole his property, and kicked out and divorced him, and *the Court cannot assume the insured wanted her to have the proceeds of his insurance after the divorce, because of such treatment and his mental inability to form such an intention.*

Therefore, if the respondent was not legally obligated to pay the ex-wife under the change of beneficiary, and was also not obligated to pay her under the original designation —then it must pay to the petitioner children under the Florida Statute above quoted.

IMPORTANCE OF GRANTING THIS WRIT OF CERTIORARI.

It is felt that the situation involved here comes up more frequently than our law reports would indicate. That is to say that there are more mental cases whose insurance proceeds go to their ex-wives, by operation of law (under a wrongful indulgence in a legal fiction) rather than to their children, than would appear on first blush. Since this question has never been exactly settled by any case we have found reported in the English language, it is felt that it is important enough for this Court to establish the law once and for all. The equitable considerations are as strong as ever appeared in a case of personal relations between the father and children and father and ex-wife.

Therefore, we sincerely feel that since the Court must make a novel decision that it should sustain the petitioners' cause of action, first, because of legal reasons, and secondly, because of the very high equitable reasons—the obligations of the father to his children rather than to the divorced wife who had been judicially established as a fraud and a trustee *ex maleficio*.

Respectfully submitted,

WALTER WARREN,
212 North Fourth Street,
Post Office Box 83,
Leesburg, Florida,
Attorney for Petitioners.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 8 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 141.

JEANNE S. WEED and SALLY ANNE DeLUCCIA,
Petitioners,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WALTER WARREN,
212 North Fourth Street,
Post Office Box 83,
Leesburg, Florida,
Attorney for Petitioners.

GURNEY, GURNEY & HANDLEY,
203 North Magnolia Avenue,
Orlando, Florida,
Attorneys for Respondent.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo. HArrison 1-3030

INDEX

Alphabetical List of Authorities Cited 1
Statement of the Case 3
Issues Involved 6
Conclusion 17
Exhibit "A" 19

Table of Authorities

Avondale v. *Sovereign Comp. W.O.W.*, Neb., 279 N.W. 355 (1938) 14, 15
Carter v. *Carter*, 88 So.2d 153 (1956) 12
Daniels v. *Grand Lodge*, Texas, 62 S.W.2d 548 (1933) 14
Federal Life Insurance Company v. *Tietsort*, 131 F.2d 448 (7th Cir., 1942), cert. denied 318 U.S. 768, 63 S. Ct. 762 (1943) 7
Filley v. *Illinois L. Ins. Co.*, 91 Kan. 220, 137 Pac. 793 (1914) 7
Jenkins v. *Jenkins*, 112 Cal. App. 402, 297 Pac. 56 (1931) 7
John Hancock Mutual Life v. *Soluri*, 134 F. Supp. 86 (S. Ct. N.Y., 1955) 7
Mayfield v. *Fidelity and C. Co.*, 16 Cal. App. 611, 61 P.2d 83 (1936) 7
Metropolitan Life Insurance Company v. *Louisville Trust Company*, Ky., 89 S.W. 268 (1905) 14, 15
O'Brien v. *Elders*, 250 F.2d 275 (5th Cir., 1957) 7
Overheiser v. *Overheiser*, 63 Ohio St. Rep. 77, 57 N.E. 965 (1900) 7
Renick v. *Mutual Life Insurance Company of New York*, Ky., 106 S.W. 310 (1907) 14-15
Slavin v. *Slavin*, 165 N.Y. App. 362, 151 N.Y. Supp 60 (1914) 7

TEXT BOOKS

175 A.L.R. 1224 6
29 Am. Jur., Insurance, §1677 10
46 C.J.S., Insurance, §1175 10
46 C.J.S., Insurance, §1198 15

STATUTES

Rule 19, 28 U.S.C.A. 2
Rule 23, 28 U.S.C.A. 1-2

IN THE

SUPREME COURT OF THE UNITED STATES

No.

JEANNE S. WEED and SALLY ANNE DeLUCCIA,
Petitioners,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In order to assist the Court and for reasons of clarity, we shall refer to Petitioners as Plaintiffs and Respondent as Defendant.

In Rule 23, 28 U.S.C.A., we find clearly stated what a Petition for Writ of Certiorari shall contain and one of the most important requirements is contained in Paragraph 1 (h) of said Rule which reads as follows:

"A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 19."

Rule 19 referred to above sets out the considerations governing review on Certiorari and while said Rule makes it clear that the considerations listed are not controlling nor fully measure the Court's discretion, it does indicate the character of reasons which will be considered. This same rule points out that a review on Writ of Certiorari is not a matter of right, but of judicial discretion and will be granted only where there are special and important reasons therefor. Nowhere in Plaintiffs' Brief can we find any reason or consideration remotely connected with or reflecting the character of those set forth in Rule 19 for this Court to grant the request of the Petitioners. Furthermore, there is not an attempt on the Plaintiffs' part to present a reason.

Not only is this basic requirement missing but in explaining the importance of granting the Writ of Certiorari, Plaintiffs make it only too evident that the factual situation presented to the Court has never come up before in a reported case and a cursory reading of the Amended Complaint will explain why it never will again. Plaintiffs are attempting to overcome this fatal deficiency in their Brief by a passionate appeal to this Court based on an illusion that there exists equities against the Defendant when, in fact, the opposite is true. But even assuming that equities did exist, it would be no reason for Plaintiffs to have this Court promulgate a rule of law which would disrupt and confuse existing sound and long established basic principles of legal jurisprudence and otherwise prove again the wisdom of the maxim "hard cases make bad law."

Furthermore, Plaintiffs' Brief did not properly nor completely reflect the entire factual situation and for this reason, the Defendant shall present in chronological order a statement of the important facts found in Plaintiffs' Complaint and Amended Complaint.

STATEMENT OF THE CASE.

In December of 1947 and February of 1948, George E. Stevens purchased three insurance policies from the defendant insurance company and had the beneficiary thereof designated as his wife, Louella H. Stevens.

Sometime after the issuance of said policies, the insured's mental and physical health began to fail him and on September 26, 1951, the insured was adjudged mentally incompetent. Later that same year the Court adjudged that the insured was competent. No allegation appears in either the original or amended Complaint that the defendant insurance company was ever informed of the above proceedings. On November 22, 1952, after having been restored to competency, the insured executed a request for change of beneficiary, again naming as beneficiary his wife, Louella H. Stevens, if living at the death of the insured and if not living, then in equal shares to two of his daughters. Colvin Georgeanne Stevens and Diana Jane Stevens. Neither of these contingent beneficiaries are Plaintiffs herein. The Plaintiffs are two other daughters of the insured by a former marriage. It is noted that no change was made or attempted to be made to change the primary beneficiary from the beneficiary named in the original application for the policy.

On April 15, 1953, George E. Stevens was adjudged mentally incompetent and the First National Bank of Leesburg, Florida, was appointed his guardian, and proceeded

to take active steps to administer his property. Again it should be noted that neither Complaint alleges that the defendant insurance company was ever informed of any of the above proceedings.

On November 4, 1953, the First National Bank of Leesburg, as said guardian, instituted an action against Louella H. Stevens and others for the purpose of requiring Mrs. Stevens to account for all the property of the insured. The proceeding was settled by agreement of the parties with approval of the Court. It was not alleged in the Complaint or Amended Complaint that the defendant insurance company was ever informed of the above proceedings.

On July 9, 1954, Louella H. Stevens divorced the insured but there is no allegation in the Complaint that the defendant insurance company was ever notified or knew of said divorce. On May 1, 1955, the insured departed this life and in due course the defendant insurance company paid the beneficiary of record, Louella H. Stevens, the proceeds of the aforementioned insurance policies.

On May 9, 1957, the County Judge's Court in Lake County, Florida, rendered an order revoking the Will of the insured stating that the Court felt that back in September 16, 1952, when said Will was executed, the insured did not possess testamentary capacity to make a Will. Again we note that the Plaintiffs have never alleged that the Defendant knew or was informed of this proceeding.

From the facts as shown by the pleadings, it appears that on the date of insured's death the Defendant was only informed or knew that:

(1) The insured during 1947 and 1948, while mentally competent, had purchased three insurance policies naming Louella H. Stevens, his wife, his beneficiary;

(2) That on November 22, 1952, the insured effected a change of beneficiary, again naming his wife, Louella H. Stevens, as primary beneficiary;

(3) That on May 1, 1955, the insured died without having requested or attempted to again change his beneficiary.

Based on these facts and without notice of other claims, the defendant insurance company in due course paid the policy proceeds to the beneficiary of record, Louella H. Stevens, and thereby performed the contract of insurance.

On or about May 1, 1959, four years after the insured's death and the payment of the proceeds to the beneficiary of record, the Plaintiffs herein filed this suit against the Defendant alleging that one-half of the above proceeds should not be paid to them and *a fortiori* should not have been paid to the beneficiary named in the policies.

The United States District Court for the Southern District of Florida on March 17, 1960, after the affected parties were heard, granted Defendant's Motion to Dismiss with leave for Plaintiffs to amend.

On May 4, 1960, the same Court again, after all the affected parties were heard on Defendant's Motion to Dismiss the Plaintiffs' Amended Complaint, granted said Motion with prejudice, there appearing no request for further amendment.

Plaintiffs appealed to the Court of Appeals for the Fifth Circuit and after all the affected parties filed their Briefs and presented oral argument, said Court on March 27, 1961, affirmed the holding of the lower Court with opinion. Furthermore, Plaintiffs' entire Brief has failed to properly place before this Court material issues that

are presented by this cause and upon which the two lower Courts based their holdings. The first issue is as follows:

ISSUE No. 1.

Where a husband procures a policy of insurance naming his spouse as beneficiary, does a subsequent divorce terminate the beneficiary's right to the proceeds of the life insurance policy or stated differently, where a husband procures a policy of life insurance and designates the beneficiary as "payable to my wife, Louella H. Stevens," does a subsequent divorce decree by operation of law and without notice to insurer effect a change of such beneficiary

The general rule is that where the husband has designated his wife as beneficiary under an ordinary policy of life insurance designating her by her name, or with the additional words, "wife" or "my wife", etc., her interest as beneficiary is not affected by a subsequent divorce.

This general statement is found in a definitive annotation on this subject titled, "Divorce of Insured and Beneficiary as Affected the Latter's Right in Life Insurance," 175 A.L.R. 1224.

It has been contended, but without success, that the word "wife" used in connection with a named beneficiary fixes the status of the beneficiary at the time the proceeds are payable so that a second wife, or a secondary beneficiary, is entitled to the proceeds as against a divorced wife named in the policy. The law is well established in the majority of the jurisdictions that the use of the word "wife" in connection with a named beneficiary is descriptive only; that is, a mere identification of the person, and that the name, but not the description or identification, identifies the person entitled to the proceeds of the policy.

The leading New York case on this question is found in *Slavin* v. *Slavin*, 165 N.Y. App. 362, 151 N.Y. Supp. 60. See also *Overheiser* v. *Overheiser*, 63 Ohio St. Rep. 77, 57 N.E. 965; *Filley* v. *Illinois L. Ins. Co.*, 91 Kan. 220, 137 Pac. 793; *John Hancock Mutual Life* v. *Soluri*, 134 F. Supp. 86 (1955); *Federal Life Insurance Co.* v. *Tietsort et al.*, 131 F.2d 448 (1942); certiorari was denied 318 U.S. 768, 63 S. Ct. 762.

It is almost without exception that the jurisdiction of this country follows the general rule stated above. As a matter of fact, there are only two jurisdictions which have adopted a contrary rule; these are, Kentucky and Texas which rule, the Plaintiffs admit, is a minority holding.

In this connection it should be noted that in the State of Florida (where all the acts took place and where the insured and beneficiary lived), California (where the insured died), and New York (where the contract was issued and performed), the general rule above discussed is followed. *O'Brien* v. *Elders*, 250 F.2d 275 (1957); *Jenkins* v. *Jenkins*, 112 Cal. App. 402, 297 Pac. 56 (1931); *Mayfield* v. *Fidelity and C. Co.*, 16 Cal. App. 611, 61 P.2d 83 (1936); and *Slavin* v. *Slavin*, *supra*

Therefore, it is apparent by the great weight of authority and also by all the states whose laws could possibly be involved in this litigation that where the term "wife" is used in describing a named beneficiary in an insurance contract, it is considered as being descriptive of the person named only, and the person so named is held to be entitled to the proceeds of a life insurance policy unaffected by a subsequent divorce.

ISSUE No. 2.

If a husband procures a life insurance policy designating his wife as beneficiary and subsequently but unknowingly to the insurance company, the insured becomes mentally incompetent and his wife unknowingly to said insurer does thereafter divorce the insured during said mental incompetency, does the law, absent any action to change the beneficiary of record by the insured or his legally appointed guardian, step in without any notice to the insurer and reform the insurance contract ex parte?

If the Court should sweep aside the immaterial from the material, it would find that the Plaintiffs are attempting to have this Court rule that because of certain actions by the beneficiary, all of which were unknown to the Defendant, the insurance contract was automatically reformed by operation of law and without notice to the Defendant and that the insurer by paying the beneficiary of record breached the reformed *ex parte* contract which said insurer did not know existed. Simply stated, Plaintiffs are attempting to effect a change of beneficiary without complying with the terms of the insurance contract and further wants to make said change retroactive as of some period antecedent to the insurer's having paid the beneficiary of record.

At this point it should be noted that there were three periods when the insured or his representatives actively contacted the Defendant and during each of these contacts both parties were competent individuals. The first contact was when the insured purchased said policies and the insured was competent. At this time insured named Louella H. Stevens as his beneficiary. The second contact was when the insured effected a change of beneficiary and

the insured was again judicially sane. He again named Louella H. Stevens as his beneficiary but added contingent beneficiaries. The third contact was at the insured's death and his personal representatives were competent.

Plaintiffs will undoubtedly argue that the insured could not change his beneficiary because of the insured's insanity but this is certainly no excuse because the First National Bank of Leesburg was appointed the insured's guardian and it had knowledge of the insurance policies and therefore could have, if it so desired or felt it was their ward's desire, petitioned the Court for authorization to effect a change of beneficiary. Plaintiffs never alleged in their Complaint that this was ever attempted, and while, for the purpose of a Motion to Dismiss, the Court must assume that everything in the Complaint is true, the Court must also logically assume that the Plaintiffs have alleged in the Complaint every fact which supports their cause. This is especially true in the present situation where the Plaintiffs by their Amended Complaint have evidenced an intent not to sacrifice clarity for brevity.

In Plaintiffs' Brief at Page 14 they state that they cannot assume that the insured intended for his ex-wife to have the insurance proceeds because he did not change the beneficiary by reason of the fact that the insured was mentally incapable to form such an intent. However, the Plaintiffs have no difficulty in assuming that the insured, under the same mental handicap, intended for them to have the proceeds of the policy. Certainly at all times when the record indicates that he was in possession of his faculties, he did nothing insofar as Defendant was advised to signify that he did not intend for the named beneficiary to have the proceeds. Neither can we assume that without any intent or act on his part, brought to the attention of the Defendant, that the contract would be reformed.

We would like to submit to the Court that it is only after the time that Plaintiffs allege the insured became mentally incompetent that the insured evidenced signs of "bitterness" and "murderous intent."

This does not mean that a mentally fit George E. Stevens would not desire his wife to be his beneficiary and the Courts have recognized this when they have consistently found that an insane person may not change the beneficiary of his life insurance policy and that if an incompetent should attempt such a change the original beneficiary may void the change and recover under the policy. 29 Am. Jur., Insurance, §1677 and 46 C.J.S., Insurance, §1175. Furthermore, it should be remembered that during the time the Plaintiffs allege the insured was insane, the insured again made his wife, Louella H. Stevens, the beneficiary of his insurance policy by initiating and perfecting a change on or about November 22, 1952. Perhaps more important than the above affirmative act is the fact that the Plaintiffs have never alleged that the insured actually intended or attempted to specifically change the beneficiary of his life insurance policy in any manner so as to remove Louella H. Stevens from her role as beneficiary nor is there any allegation that the insured, while sane or insane, ever intended or attempted to make the Plaintiffs, Jeanne S. Weed and Sally Anne DeLuccia, the beneficiaries of his insurance policies.

All that either Complaint alleges are certain circumstances from which could be drawn the conclusion that the insured, sane or insane, did not want his wife to have this money. Nevertheless, assuming this to be true, a change signifies a substitution of one person or thing for another person or thing and nothing indicates who the insured wanted to substitute as beneficiary, assuming he did intend to replace his wife. In none of the cases we

have examined have we seen a Court recognize the substitution of a beneficiary without clear indication of whom the insured intended the substitute to be.

Therefore, to summarize the last two points, it can be said that neither the wife's subsequent divorce nor the insured's subsequent insanity could in any way affect the right of the beneficiary named in the insurance policy to collect the proceeds.

ISSUE No. 3.

Does a holding in 1957, years after the proceeds have been paid the beneficiary named in the policy, of lack of testamentary capacity of a testator policyholder in 1952, retroactively invalidate a designation of beneficiary made in the earlier years?

Plaintiffs have argued that since a Court decided that George E. Stevens did not have testamentary capacity to execute a Will on September 16, 1952, that he did not have the mental capacity necessary to execute the request for change of beneficiary on November 22, 1952. The Defendant would like to submit to the Court that it was not determined that the insured lacked testamentary capacity on September 16, 1952, until May 9, 1957, or almost two years after the said defendant insurance company in good faith and without notice of another claim had already paid the beneficiary of record. We point this out to show the Court that the defendant insurance company cannot be bound or held to notice of said judicial determination of insanity for the simple reason that when the time came to pay the proceeds of the insurance policy, there was no such Court decision in existence. The Defendant cannot be expected to know in the year 1955 what some Court might decide in the year 1957, especially when the Plaintiffs have not al-

leged that the Defendant was ever aware of or had reason to know said suit had commenced.

Plaintiffs cannot claim that they did not know of the insured's alleged incapacity because they have stated in their Amended Complaint that shortly after the death of the insured, they instituted the aforesaid action in the Probate Court which resulted in the insured being declared without testamentary capacity on September 16, 1952. Thereupon, upon the face of the Complaint, it is clearly shown that said Plaintiffs sat upon their rights and now should be barred from contending that said request for change of beneficiary is ineffective.

Also we submit to the Court that the change of beneficiary attacked here is not of importance because if it were thrown out, Louella H. Stevens would still have been the beneficiary to receive the proceeds by reason of the original designation in the application for the policies. Furthermore, the change of beneficiary did not name either of the Plaintiffs as contingent beneficiaries but it did name the insured's two other daughters. It is quite clear from the above that if the change of beneficiary was effective and assuming that Louella H. Stevens should not have received said proceeds then the contingent beneficiaries only would have a right to said proceeds and only they can object. *Carter* v. *Carter*, 88 So.2d 153. Therefore, Plaintiffs have no standing to sue.

ISSUE No. 4.

If a life insurance company in good faith, and without knowledge of any reason not to do so, remits to the beneficiary of record the proceeds of a life insurance policy upon due proof of the death of the insured, are they liable a second time to a third person, who with full knowledge of all his rights, sat on his rights and did not notify said insurer of his claim prior to said insurer's paying the beneficiary of record and insofar as the record reflects has never notified said insurance company of his claim by submitting due proof of the death of the insured?

There is no allegation in either the Complaint or the Amended Complaint that the Plaintiffs ever put the insurance company on notice of their claim to said insurance proceeds prior to the insured's death or sent the defendant insurance company due proof of the death of the insured in order to put the defendant insurance company on notice of their claim which is a condition precedent to their receiving said insurance proceeds and bringing an action for said proceeds. There is no allegation that the Plaintiffs ever informed the defendant insurance company of their claim or the basis for their claim to said insurance proceeds prior to the insurance company paying said proceeds to the beneficiary of record, Louella H. Stevens. Insofar as the Complaint and Amended Complaint show, said demand was made on the same date this present action was commenced, on or about May 1, 1959, four years after the death of the insured.

The above brings us to one of the most glaring weaknesses of Plaintiffs' Complaint and illustrates such an important defect that it alone is sufficient to enable the Court to sustain the United States District Court's ruling and

also the ruling of the Court of Appeals for the Fifth Circuit. In Plaintiffs' Complaint, Amended Complaint and Brief submitted, they have alleged ultimate facts, evidentiary matter, conclusions of law and incorporated irrelevant exhibits, etc., all in an attempt to demonstrate and to drive home to this Court that Louella H. Stevens performed acts that were "without parallel for diabolical cunningness and wickedness" and that her actions "had been so heinous and so contrary to what has been considered by all civilization to be proper conduct for a wife and mother" that this Court should not allow Louella H. Stevens to receive the insurance proceeds, but, the simple truth is that Louella H. Stevens has already received the insurance proceeds. The Plaintiffs are not bringing this suit against the "diabolical, cunning and wicked" Louella H. Stevens but are instead suing the Equitable Life Assurance Society of the United States.

Plaintiffs have never alleged in their Complaint or Amended Complaint that the insurance company is guilty of any wrongdoing. Plaintiffs have never alleged that the insurance company knew or had knowledge of any of the "heinous acts" of the beneficiary nor of the divorce. Plaintiffs have never alleged that they took any steps to put the insurance company on guard as to the Plaintiffs' claim to the insurance proceeds prior to the payment by the insurance company to the beneficiary of record.

The Courts have continuously held that payment in good faith to the beneficiary of record by the insurance company without knowledge of facts vitiating their own claim will prevent a second recovery by another claimant. *Daniels* v. *Grand Lodge*, 62 S.W.2d 548; *Avondale* v. *Sovereign Comp. W.O.W.*, 279 N.W. 355 (1938); *Metropolitan Life Insurance Company* v. *Louisville Trust Company*, 89 S.W. 268 (1905); *Renick* v. *Mutual Life Insurance*

Company of New York, 106 S.W. 310 (1907); and 46 C.J.S., Insurance, §1198.

It has been stated that the remedy of the claimant, if any, is against the person who wrongfully collects the proceeds and not against the insurance company. *Avondale* v. *Sovereign Comp. W.O.W., supra; Renick* v. *Mutual Life Insurance Company of New York, supra;* and *Metropolitan Life Insurance Company* v. *Louisville Trust Company, supra.*

For years, our society through the Courts and Legislatures have placed great pressures upon the insurance companies to coerce them to perform their obligations under an insurance policy with the minimum amount of delay. If the Court now holds that a possible claimant may sit upon his alleged rights until after an insurance company, acting in good faith, and without notice or knowledge of another claim, has paid the insurance proceeds with due diligence to the beneficiary of record and then allow the dilatory claimant to recovery a second time from the insurance company, the Courts would be performing an injustice of the highest sort and one which neither the law requires or our society desires. No insurance company would ever know when it had discharged its contractual obligation or whether it was solvent or not if years after paying the record beneficiary, without knowledge of a conflicting claim, the contract could be retroactively reformed without its knowledge and a stranger to the contract be thereby vested with a cause of action against it.

So that this Court will not be confused as to the particular holdings that Plaintiffs are petitioning to have reviewed, we think we should quote a portion of the ruling of the Court of Appeals for the Fifth Circuit, a copy of

which has been attached hereto, marked Exhibit "A", for the Court's convenience. We must do this because on Pages 8 and 9 of Plaintiffs' Brief, they have attempted to give their interpretation of the Court's holding and in so doing, it is evident that they did not properly construe the Court's opinion because of the lack of similarity between their interpretation and the actual holding. The Court held as follows:

> "Courts are called on to do some powerful divining at times. This complaint goes further than most. Here, the appellants want this Court to hold that the insured was not capable of forming an intention to change the beneficiary at the time of the divorce—but if he had been capable of forming such an intention, he would have changed the beneficiary and designated the plaintiffs as beneficiaries. Our license for divination does not allow us to go that far. Neither the divorce nor the insanity operate in themselves to change the terms of a contract. The defendant insurance company in good faith paid the proceeds in accordance with its obligations under its contract with the insured. It does not have to pay again on some theory that the contracts were changed retroactively—because they might have been changed, if the insured had been competent at the time of the divorce.
>
> "Payment in good faith to the beneficiary of record by the insurance company without knowledge of facts vitiating the claim will prevent a second recovery by another claimant. * * * If the plaintiffs have a remedy it is against the person who wrongfully collects the proceeds and not against the insurance company."

Once the facts are clearly presented, the above holding is easily understood but this is exactly what the Plaintiffs do not want. Plaintiffs are insisting to the Court, "Let's ignore the facts and get down to the equities."

Plaintiffs know that their alleged cause of action, just like other bats of the law, will only maintain itself in darkness for once the bright rays of truth and facts light up the area of the controversy, their cause of action will, like the bat, fly out the window.

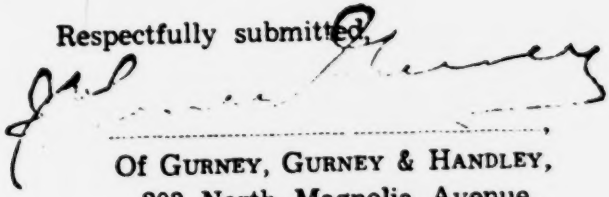
CONCLUSION.

The facts presented positively establish that the factual situation herein presented is unique to the Plaintiffs and probably has never existed before and will never exist again, but that if it should, there are established fundamentals of law presently existing which, when applied to these facts, will enable the Courts to properly and speedily deal with the same. While the factual situation is unique, the issues presented are neither unique nor substantial and even assuming that the Plaintiffs were in a position to prove each and every allegation contained in their Complaint and/or Amended Complaint, it is quite evident that they would have failed to prove a claim upon which relief could be granted.

Plaintiffs' only grounds for certiorari are based on the many equities which they envision are against Louella H. Stevens, but they are not suing Louella H. Stevens and between the Plaintiffs and Defendant there are no equities against the Defendant. It is respectfully submitted that the United States District Court and the Court of Appeals for the Fifth Circuit did not commit error and that no proper grounds for review have been presented by

the Plaintiffs and that this Petition should, therefore, be denied.

Respectfully submitted,



Of GURNEY, GURNEY & HANDLEY,
203 North Magnolia Avenue,
Orlando, Florida,
Attorneys for Respondent.

I HEREBY CERTIFY that a copy hereof has been furnished by mail this 1st day of August, 1961, upon WALTER WARREN, ESQ., 212 North Fourth Street, Post Office Box 83, Leesburg, Florida, Attorney for Petitioners.

Attorney.

EXHIBIT A.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 18441.

JEANNE S. WEED and SALLY ANNE DeLUCCIA,
Appellants,

versus

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 27, 1961.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: In 1947 and 1948 George Stevens purchased insurance policies from the Equitable Life Assurance Society, totaling $55,000. He designated the beneficiary as his "wife, Louella H. Stevens". In 1951 the insured was adjudged insane. In 1952, after having been restored to judicial sanity, Stevens executed a change of beneficiaries, designating as the primary beneficiary, his wife, Louella Stevens, and as contingent beneficiaries the two minor daughters of his marriage to Louella Stevens. In 1953 Stevens was again adjudged insane. In 1954 Louella Stevens divorced the insured in

Nevada on the ground of insanity. In 1955 the insured died. In due course the Equitable, having no notice of any dispute over the proceeds, paid the divorced wife the amounts required under Stevens's insurance policies. In 1957, the Florida courts set aside Stevens's will (executed in 1952) on the ground that the insured did not possess testamentary capacity to make a will.

Four years after the Equitable had paid the insurance proceeds to the beneficiary, Mrs. Stevens, in accordance with terms of its contract, two adult natural children of the insured sued the Equitable for the amount of the insurance. The theory of the complaint is that (1) the divorced wife was not entitled to the proceeds under the 1952 designation of beneficiary, because the insured was not mentally competent and (2) she has no right under the original designation, because she "treated [the insured] so abominably, stole his property, and kicked him out and divorced him, and the Court cannot assume the insured wanted her to have the proceeds of his insurance after divorce, because of such treatment and his mental inability to form such an intention." So, plaintiffs say, the proceeds should descend according to the Florida Statutes.

Courts are called on to do some powerful divining at times. This complaint goes further than most. Here, the appellants want this Court to hold that the insured was not capable of forming an intention to change the beneficiary at the time of his divorce—but if he had been capable of forming such an intention, he would have changed the beneficiary and designated the plaintiffs as beneficiaries. Our license for divination does not allow us to go that far. Neither the divorce nor the insanity operate *in themselves* to change the terms of a contract. The defendant insurance company in good faith paid the proceeds in accordance

with its obligations under its contract with the insured. It does not have to pay again on some theory that the contracts were changed retroactively—because they might have been changed, if the insured had been competent at the time of the divorce.

Payment in good faith to the beneficiary of record by the insurance company without knowledge of facts vitiating the claim will prevent a second recovery by another claimant. *Daniels* v. *Grand Lodge*, Ct. Civ. App. Tex., 1933, 62 S.W. 2d 548; *Avondale* v. *Sovereign Comp. W.O.W.*, Sup. Ct. Nebr., 1938, 279 N.W. 355; *Metropolitan Life Insurance Company* v. *Louisville Trust Company*, Ct. App., Ky., 1905, 89 S.W. 268; *Renick* v. *Mutual Life Insurance Company of New York*, Ct. App., Ky., 1907, 106 S.W. 310. If the plaintiffs have a remedy it is against the person who wrongfully collects the proceeds and not against the insurance company.

The judgment is AFFIRMED.